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VIA ELECTRONIC MAIL & FedEx

Dennis J. McLerran, Regional Administrator
EPA, Region X
Regional Administrator's Office, RA-140
1200 6th Avenue, Suite 900
Seattle, Washington 98101

RE: Timing and Role of 404(c) Review

Dear Mr. McLerran:

You have received two requests asking EPA to commence an evaluation under subsection 404(c) of the Clean Water Act. They pertain to the Kvichak and Nushagak River drainages of southwest Alaska. Requestors seek to prohibit or restrict discharge of dredge spoils or fill from any "metallic sulfide mining" into any wetland or waters of those drainages. The request from six tribes (May 2, 2010) calls for evaluation of a wide geographic area, not a specified locale. The request is directed to an entire industrial category, not a particular discharge of a particular material. The request from Bristol Bay Native Corporation (August 12, 2010) is equally unrefined, initially speaking of a "carefully tailored prohibition" but never offering any made-to-measure alterations which might achieve a fitting balance.

On behalf of Pebble Limited Partnership (PLP) this firm offers the view that pursuing such amorphous 404(c) evaluations, or commencing any 404(c) review at this time, would be inconsistent with the traditional use of this statutory authority; would unreasonably appropriate decision-making customarily vested in NEPA reviewers and permitting processors; and would not be conducive to the end-goal of a 404(c) process, which is for the Administrator to determine whether a proposed discharge of specified material into a defined area will have an unacceptable adverse effect on certain enumerated resources after taking into account proposed corrective actions. For these reasons, PLP respectfully suggests that the two requests be tabled until NEPA and permit processes have run their course. At that time EPA can better ascertain whether there exists any need for a truly "tailored" restriction on any specifically defined disposal site. This suggestion is supported by the following analysis.

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I. BRIEF RESTATEMENT OF THE AUTHORITY

Under Clean Water Act section 404(b), the Army Corps of Engineers may specify in dredge or fill permits those areas where dredge spoils or fill may be discharged. These disposal sites are selected through application of the Army's public interest test and EPA's 404(b)(1) guidelines. *33 U.S.C. §1344(b); 33 C.F.R. §323.6, §325.2(a)(6); 40 C.F.R. Part 230.* The Administrator of EPA is authorized to deny, restrict or prohibit the specification of a disposal site if, after notice and opportunity for public hearing, he or she determines that the discharge of such materials into such area will have unacceptable adverse effects on municipal water supplies, shellfish beds, fishery areas, wildlife or recreation. *33 U.S.C. §1344(c).* A process to be followed by the Administrator is set-out in federal regulations. *40 C.F.R. Part 231.*

II. TRADITIONAL USE OF THIS AUTHORITY

In 1979, when promulgating regulations to implement 404(c), EPA opined that this authority might be exercised at any time. The process may be invoked before a permit is applied for, while an application is pending, or after a permit has been issued. *44 Fed.Reg. 58076 (Oct. 9, 1979).*[1] However, as far back as 1979 EPA felt confident that most environmental problems would be prevented through the routine operation of the permit program. *Id. at 58,079.* And, indeed, 404(c) has never been used preemptively.

The first recorded exercise was a restriction on the placement of solid waste in certain areas of the North Miami Landfill. In that case a permit had issued five years earlier, substantial deposition of garbage had already taken place, and the impacts had been quantified in actual test results. EPA stated that it was, "in effect, ... vetoing a permit [already] issued by the Corps of Engineers." *46 Fed.Reg. 10,203 (Feb. 2, 1981).*

Subsequently, EPA has tried to resolve specification problems before permit issuance. This policy is based on both a concern for the plight of the applicant and a desire to protect the site before any adverse impacts occur. Indeed, Army Corps regulations now allow the permit process to continue but demand that the final permit be withheld pending resolution of any 404(c) intervention. *33 C.F.R. §323.6(b).* There is no risk in waiting. Consequently, EPA has never initiated the 404(c) process before an applicant submitted his or her permit application and substantial reviews had taken place under routine permit programs.

For instance, the most recent exercise of 404(c) involves Spruce No. 1 Mine in West Virginia, a case relied upon by the six tribes in their request that Region X be "proactive." Yet EPA did not commence that 404(c) process at Spruce Mine until after the agency had

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[1] Preamble to 40 C.F.R. Part 231, the 404(c) procedural regulations.

commented repeatedly on a Draft Environmental Impact Statement; had offered its assistance to the Army Corps and the permittee following a Final Environmental Impact Statement; had presented localized and specified concerns during development of a Programmatic Environmental Impact Statement; and had exercised its other authorities through both the NPDES permit process and the Dredge and Fill Permit process. *75 Fed.Reg. 16,791 at "Project History" (April 2, 2010).*

The "proactive" approach proposed by Bristol Bay Native Corporation and the six tribes is not consistent with precedent.

III. APPROPRIATE AND MEANINGFUL DECISIONMAKING

EPA's traditional approach is well founded on the words used by Congress in 404(c):

> (c) The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any *defined area* as a disposal site, and he is authorized to *deny or restrict the use* of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of *such materials into such area* will have an unacceptable adverse effect *on municipal water supplies, shellfish beds* and *fishery areas* (including spawning and breeding areas), *wildlife, or recreationa*l areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection. (emphasis supplied)

To make any reasoned determination, there must be a "defined area" to evaluate. Most 404(c) determinations have been fairly modest in their areal extent, focused upon specific segments of waterways or particular units within a larger site. A typical example was Atlantic Richfield's (ARCO) proposal to place 112,000 cubic yards of gravel on 21.5 acres of tundra to construct a production well pad and an east-west access road near the Kuparuk River on Alaska's North Slope. Region X issued a proposed 404(c) determination for the purpose of staying activity under an already issued permit and solicited data on whether the specified discharge in the specified location would or would not cause unacceptable adverse effects on wildlife. *56 Fed.Reg. 22,161 (May 14, 1991).* As a result of several meetings between Region 10 and ARCO, the company identified an alternative pad location and road alignment. ARCO applied for and received a modification of their Corps permit to authorize the new configuration. EPA then withdrew its proposed 404(c) determination because these modifications satisfied the Region that wildlife in the area would not be unacceptably affected. *56 Fed.Reg. 58,247 (Nov. 18, 1991).* In contrast, the pending requests generally address two watersheds. The Kvichak River drains more than 8,000 square miles while the Nushagak River watershed encompasses

more than 12,000 additional square miles. This cannot fairly be considered a "defined area" as sought by Congress.

Before denying or restricting "the use", EPA has to know what that use will be. At a minimum the agency must have a project description on which to base "findings." So, for example, in the largest areal exercise of 404(c) to date -- a 630,000 acre Yazoo Backwater Civil Works Project -- EPA was able to focus upon particular subunits and provide particularized comments on various alternative activities because they had been identified in an Environmental Impact Statement. *73 Fed.Reg. 54,398 (Sept. 19, 2008).* Here, the requests reference "a potential Pebble mine," which is a prospective undertaking not yet defined by any current project description.

EPA is to determine the effects of discharging "such materials into such area." The first step in this analysis is for a Regional Administrator to determine what "could result." *40 C.F.R. §231.1(a).* The last step is to set forth written findings on the adverse effects those materials "will have." *§404(c).* Both steps require a particularized knowledge about the materials to be discharged and the methods of disposal into the specified site. Here, the requestors make a bald allegation that PLP's undertaking will be a "metallic sulfide mine" with "acid-generating waste rock." The term "metallic sulfide mine" is not a recognized term of art. While waste rock from a mine in the Kvichak and Nushagak River drainages may have acid-generating potential, whether it does generate will pivot on the methods and manner of discharging such material into such area. Any hypotheticals evaluated at this time would be naught but speculation.

Finally, Congress gave 404(c) a definite focus on particular types of resources. EPA looks for the effect on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas. The broader inquiries called for under routine permit programs ought go first. As EPA noted when it first outlined this process:

> Section 404(c) authority should not be confused with the Administrator's obligation under section 309 of the Clean Air Act to comment on environmental impact statements **(EIS)** prepared for section 404 projects and to refer such projects to the Council on Environmental Quality when he finds them to be environmentally unsatisfactory. Comments, objections to Corps permits, and CEQ referrals may be based on any kind of environmental impact. On the other hand, 404(c) authority may be exercised only where there is an unacceptable adverse effect on municipal water supplies, shellfish, fisheries, wildlife or recreation. *44 Fed.Reg. at 58076.*

In sum, subsections 404(b) and (c) involve "specification." The goal of 404(c) is to identify those impacts that are "unacceptable" because they are "likely to result in significant degradation." *§231.2(e).* EPA has the burden of proving, with written findings of fact, its "basis

for any determination of unacceptable adverse impacts." *44 Fed.Reg. at 58080.* The level of certainty is that such materials "will have" these impacts when discharged into the "defined area." Such conclusions require a level of knowledge typically developed during NEPA review and routine permit processing. Accordingly, 404(c) has become known as EPA's "veto" authority, not EPA's preliminary authority. Reasoned exercise of this extraordinary, discretionary program[2] strongly suggests that it be held in abeyance unless and until a measure of last resort is required to correct particularized problems in specified areas.

Sincerely,

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Attorneys for Pebble Limited Partnership

Robert K. Reges

RKR for

Susan E. Reeves

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cc: Client

[2] "By statute, the Administrator is authorized rather than mandated to overrule the Corps. 33 U.S.C. §1344(c). Because this power is discretionary, the citizen suit provision of the Clean Water Act does not apply." *Preserve Endangered Area of Cobb's History, Inc. v. U.S. Army Corps of Engineers,* 87 F.3d 1242, 1249 (C.A. 11[Ga.] 1996).

But see, *South Carolina Coastal Conservation League v. U. S. Army Corps of Engineers,* 2008 WL 4280376, *5-*8 (D.S.C. 2008)(citing cases in accord with *Cobb's History* but ultimately concluding that it was bound by a 4th Circuit decision it deemed to have recognized a "duty" of "oversight imposed by Section 1344(c).").